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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 342

DANIEL BIRMELI DINGMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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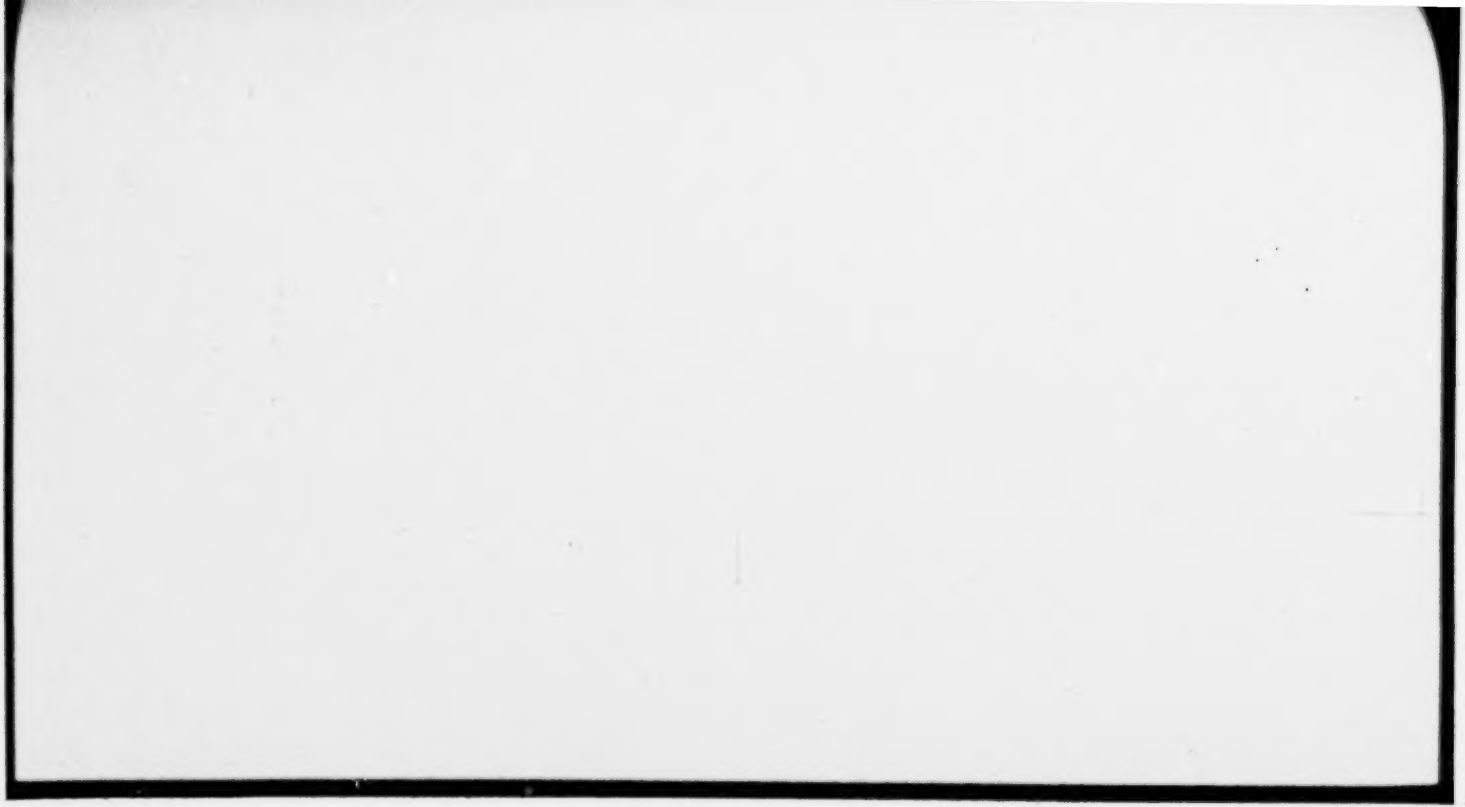
August 1, 1946



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Daniel Birmeli Dingman, respectfully petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment of that court of June 4, 1946, affirming judgment of the District Court of the United States for the Northern District of California, of November 1, 1945, convicting the petitioner for violation of the Selective Training and Service Act of 1940, *as amended,* and sentencing him to a term of three years in a Federal penitentiary.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. Sec.

347(a)), and Rule 37(b) Federal Rules of Criminal Procedure (18 U. S. C., Sec. 687).

Statutes Involved

The relevant parts of Sections 3(a), 3(b) and 5(g) of the Selective Training and Service Act of 1940 (Public Law 783, 1940; 54 Statutes 885; 50 U. S. C. App. Sec. 303(a), (b), 305(g)), (Service Extension Act of 1941 Public Law 213, 1941; 55 Statutes 626; 50 U. S. C. App. Sec. 351, 352), Territorial Use of Army and Extension of Service Act (Public Law 338, 1941; 55 Statutes 799; 50 U. S. C. App. Sec. 731, 732), and Executive Order No. 8862, August 21, 1941 (6 Fed. Register 4319) are set out in Appendix "A" to this petition.

Statement of Matters Involved

Petitioner was indicted in the Northern Division of the Northern District of California for violation of the provisions of the Selective Training and Service Act of 1940, *as amended*. The indictment alleged that petitioner, having been classified IV(E), (i.e. as a conscientious objector, *found conscientiously opposed to participation even in non-combatant service*) and assigned to a Civilian Public Service Camp, No. 148, "for work of national importance", on or about July 22, 1945, "did knowingly, wilfully and feloniously absent himself without authority from said camp." [R. 2, 3] The indictment fails to state when the petitioner had been "assigned to work of national importance."*

*See foot note p. 3 *infra*.

Petitioner, although not an attorney, himself filed and argued a demurrer to the indictment, alleging that the indictment did not state an offense against the United States in several respects, only one of which is here raised. This was that the indictment did not state any such offense "in that the defendant prior to the time of his being transferred to said Civilian Public Service Camp No. 148 had already fulfilled all of the obligations imposed, or reasonably to be inferred from either the language or the intent as having been imposed upon him under the Selective Training and Service Act of 1940, as amended, by reporting as directed by his local Selective Service Board" to numerous designated camps, including Camp No. 148, *"and therein * * * performing the work designated as work of national importance for the full period of one year, which is the maximum period of service that can be inferrerd reasonably from said Act to be required."* [R. 6]

The demurrer was overruled. [R. 10] Petitioner pleaded not guilty to the indictment, was found guilty as charged, and on November 1, 1945, was sentenced to a term of 3 years in a Federal penitentiary. [R. 4, 11, 12]

Petitioner appealed to the Circuit Court of Appeals on the ground, among others, above specified in the demurrer. [R. 15] That court on June 4, 1946, affirmed the judgment of the District Court with an opinion which appears at 24-29 of the record. The Circuit Court of Appeals in affirming the judgment of the District Court assumed, as did the District Court, that petitioner had performed "work of national importance" for more than one year in the civilian public service camps to which he had been assigned.*

---

*That petitioner had in fact performed work of national importance for more than 12 months prior to absenting himself

The Circuit Court of Appeals in its opinion (R. 28) said:

> "The same contention made here was advanced in *Wolfe* v. *U. S.*, 149 F. 2d 391, C. C. A. 6. The Sixth Circuit Court of Appeals, in rejecting the contention and affirming the conviction, stated:
>
> > 'The Act does not limit the service of a conscientious objector in works of national importance to twelve months * * *'.

---

on July 22, 1945, from Camp No. 148, as alleged in the indictment, is shown by Government Exhibits 1 and 2 introduced on his trial in the District Court. These exhibits show that petitioner was assigned to work of national importance in July 1943. While these exhibits were not made part of the record on appeal to the Circuit Court of Appeals they are referred to in that record (R. 11) and certified copies of them have been transmitted to the Clerk of this Court by the Clerk of the District Court.

Moreover, as already noted, the indictment (R. 23) failed to state when the petitioner had been "assigned to work of national importance." In this connection, it is to be noted, that the indictment alleged a violation of the Selective Training and Service Act of 1940 *as amended*, and did not allege a violation of the original Selective Training and Service Act of 1940, *as unamended* by the Extension Acts of August 18, 1941, and December 13, 1941. Presumably this was because the indictment was based on the theory that, although petitioner had been assigned to work of national importance for more than 12 months prior to the alleged offense, the original 12 month period of assignment had been extended by such Extension Acts. The alternative to this construction of the indictment is that otherwise the indictment omitted a material allegation in failing to allege that petitioner at the time of the alleged offense had been assigned to work of national importance *for less than 12 months*. Assuming this latter construction of the indictment is correct, it is possible that, strictly speaking, the demurrer should have specifically pointed out this failure of the indictment to allege a material fact. However, it is to be remembered that the demurrer was prepared by the petitioner, who is not a lawyer, and that, in substance, he did point out this insufficiency of the indictment by alleging in his demurrer that petitioner at the time of the alleged offense had already performed work of national importance for a period of twelve months (R. 6).

> "Time of service for a conscientious objector is not limited to one year. It is for the duration of the war and six months thereafter unless sooner terminated by the Director of Selective Service."

The Court's opinion in this case, however, by using asterisks in quoting from the *Wolfe* case, omitted the significant portion of the opinion of the Sixth Circuit Court of Appeals in that case. In the *Wolfe* case what the Sixth Circuit Court of Appeals really said was, p. 393:

> "The Act does not limit the service of a conscientious objector in works of national importance to twelve months *and nothing in the record indicates that any effort was made to extend his service beyond that period. He makes no pretense that he served for that period.*" (Italics supplied)

Except for the case at bar, the *Wolfe* case is, so far as counsel has been able to determine, the only case in which the question has been raised as to whether the assignment of a conscientious objector to work of national importance is limited to twelve months. The decision of that question, however, was not necessary to the sustaining of the conviction in the *Wolfe* case since, as the Court stated in that case, *supra,*

> "* * * nothing in the record indicates that any effort was made to extend his service beyond that period. He makes no pretense that he served for that period."

The Court in this case, in basing its decision of this question on the mere dictum of the Court in the *Wolfe* case, failed to note the determinative difference between the records of the two cases in this respect—the record in this case showing that petitioner at the time of absenting himself from Camp No. 148 as charged in the indictment *had*

already been assigned to and performed work of national importance for more than twelve months.

It should be noted that on July 3, 1946, Mr. Justice Reed extended the term for filing petition for a writ of certiorari in these proceedings until August 1, 1946.

Question Presented

The question here presented is whether a conscientious objector *assigned to work of national importance,* and *not inducted* either for *combatant* or *non-combatant service,* violated the Selective Training and Service Act of 1940, *as amended,* by absenting himself from a camp to which he had been assigned *after having performed work of national importance for more than 12 months under such assignment.*

The answer to this question depends on whether or not either the Service Extension Act of August 18, 1941, (50 U. S. C. App. Sec. 351, 352) (appendix "A" p. ii) or the Territorial Use of Army and Extension of Service Period Act of December 13, 1941 (50 U. S. C. App. Sec. 731, 732) (appendix "A" p. iii) extended for conscientious objectors, *found conscientiously opposed even to non-combatant service,* the 12-month period of *assignment to work of national importance* provided by the Selective Training and Service Act of 1940, or whether the extensions of service and training provided by such Extension Acts were limited to persons *inducted* into or *subject* to *active military service* and, possibly also, to conscientious objectors *inducted* for *non-combatant* service and training.

The importance of the question presented is not limited to the validity or invalidity of petitioner's conviction. In effect it extends to the validity or invalidity of the present

detention in conscientious objector camps of approximately 3000 conscientious objectors *never inducted into or subject to active military service, or even non-combatant service.*

Reasons for Allowance of Writ

The Circuit Court of Appeals for the Ninth Circuit by its judgment has decided an important question of Federal law which has not been, but should be, settled by this Court (Rule 39(b) of this Court).

Moreover, as already noted, the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case constitutes the first decision of this question by any Circuit Court of Appeals, though as shown *supra* p. 5, such Circuit Court of Appeals erroneously assumed that the question had already been decided by the Circuit Court of Appeals for the Sixth Circuit in the *Wolfe* case, *supra.*

While the question here involved, has already been stated (*supra* pp. 6, 7), it will be repeated here for convenience.

That question is whether a conscientious objector, found to be conscientiously opposed to participation even in non-combatant service, and therefore *"assigned to work of national importance"* and *not inducted* either for *combatant* or *non-combatant service,* violated the Selective Training and Service Act of 1940, *as amended,* by absenting himself from a camp to which he had been assigned *after having performed work of national importance for more than 12 months under such assignment.*

As likewise already stated, (*supra* p. 6) the answer to this question depends on whether or not either the Service Extension Act of August 18, 1941, (50 U.S.C. App. Sec.

352), or the Territorial Use of Army and Extension of Service Period Act of December 13, 1941, (50 U.S.C. App. Sec. 731, 732), extended for conscientious objectors, *found conscientiously opposed even to non-combatant service,* the 12-month period of *assignment to work of national importance* provided by the Selective Training and Service Act of 1940, or whether the extensions of service and training provided by such Extension Acts were limited to persons *inducted* into or *subject* to *active military service* and, possibly, also, to conscientious objectors *inducted* for *non-combatant* service.

In construing the original Selective Service Act of 1940 and the respective Extension Acts of August 18, 1941, and December 13, 1941, it is important to note that the 1940 Act established, so far as concerns the question here involved, three categories for registrants under the draft.

The first category is established by Sec. 3 (a) of that Act (50 U.S.C. App. 303(a)) (appendix "A" p. i) and authorizes the President "to select and *induct into the land and naval forces* of the United States *for training and service,* in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest."

The second and third categories are established by Sec. 5 (g) of that Act (50 U.S.C. App. 305(g)) (appendix "A" p. i) and relate to conscientious objectors. The second category relates to those conscientious objectors "claiming such exemption from *combatant training and service* because of such conscientious objection." As to such a conscientious objector, it is provided that he shall, "if he is *inducted* into the land or naval services under this Act, be assigned to *non-combatant service* as defined by the

President * * *." The third category relates to conscientious objectors *"found* to be conscientiously opposed to participation in such non-combatant service". As to such a conscientious objector, it is provided that he shall *"in lieu of such induction, be assigned* to work of national importance *under civilian direction."* (All italics supplied)

In other words, the Act of 1940 provides for the *induction* into *the land and naval forces* of the United States for training and service of those conscientious objectors *not found* to be conscientiously opposed to participation in non-combatant service. It provides, however, that those *found* to be conscientiously opposed even to non-combatant service, *shall not be inducted into such forces,* but, *in lieu thereof,* shall be *assigned* to work of national importance *under civilian direction.*

This distinction it will be seen becomes controlling in connection with the two Extension Acts. Moreover, that it is a real distinction and has been so construed in practice is shown by the fact that conscientious objectors *assigned to work of national importance under civilian direction* have been denied military pay and all other rights and privileges which have been accorded conscientious objectors *inducted into the land and naval forces of the United States* because not found conscientiously opposed to non-combatant service. This latter class of conscientious objectors, *so inducted,* have received the pay of members of the Armed Forces and have been held entitled to the re-employment privileges and insurance applicable to such forces. Furthermore by the express provisions of Sec. 11 of the Act of 1940 (50 U.S.C. Sec. 311) no person *not inducted* may be tried by court martial, unless already subject to such trial by prior laws. (See *Billings* v. *Truesdell* 321 U. S. 542.)

The first Extension Act, that of August 18, 1941, provided:

> "The President is hereby authorized, subject, however, to the conditions hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons *inducted* for training and service under said Act * * * and *any other members of the Army*, who are now, or who may hereafter be, in or *subject to active military service*, or training and service: *Provided*, That extension of the periods of *active military service*, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such *periods of active military service*, and training and service, such periods may be further extended by the President, *in the case of any such persons*, for such time as may be necessary in the interest of national defense * * *." (50 U.S.C. App. Sec. 352) (italics supplied.)

That the foregoing extension could not authorize the President to extend the periods of service for conscientious objectors not inducted into the Armed Forces, but assigned to work of national importance, seems patent from the very wording of the Act. There is no reference in that Act to this category of conscientious objectors, the Act specifically applying by its terms only to those persons *inducted* into the armed services or *subject to active military service* or training and service.

Moreover, the President's Executive Order No. 8862, of August 21, 1941, which is printed in Appendix "A" to this petition [p. iv] makes no reference to nor does it purport to apply to such conscientious objectors as petitioner. That order by its terms applies only to "persons *inducted for training and service* under the provisions of the Selective Training and Service Act of 1940, as amended."

Furthermore, that the Congress did not intend the first Extension Act to apply to conscientious objectors *not inducted* into the Armed Forces is shown by the express language of the second Extension Act, that of December 13, 1941, which reads as follows:

"The periods of service, training and service, enlistment, appointment, or commission, of *all members of the Army* of the United States, now or hereafter in or *subject to active military service* of the United States, are extended for the period stated in the preceding section: * * *." (50 U. S. C. App. Sec. 732) (appendix p. iii)

Obviously, again, this extension has no application to conscientious objectors of petitioner's category, since neither petitioner nor others of that category have ever been "members of the Army of the United States" or "in or subject to *active military service* of the United States."

Assuming this is so, it follows that Selective Service Regulation 652.14, quoted in the opinion of the Circuit Court of Appeals (R. pp. 27, 28) and which was promulgated December 24, 1941, effective February 1, 1942, following the enactment of the second Extension Act of December 13, 1941, is not authorized either by that Act or by the first Extension Act of August 18, 1941. That Regulation reads as follows:

> "652.14. Period of Service. A registrant in Class IV-E who has been assigned to a camp shall be engaged in work of national importance under civilian direction during the existence of any war in which the United States is engaged and during the six months immediately following the termination of any such war, unless sooner released by the Director of Selective Service." Title 32 Cumulative Supplement to Code of Federal Regulations of the United States)

In this connection it is important to note what was said by the Director of Selective Service, Major-General Lewis B. Hershey, in his report "Selective Service in Peacetime—First Report of the Director of Selective Service—1940-41" (Government Printing Office, 1942). The Director there said, at page 200:

> "In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. *It was interpreted to apply to assignees as well,* so that their term of duty was increased. . ." (italics supplied)

From the foregoing, it is to be noted that the Director of Selective Service himself recognized that there was no express authority in either of the Extension Acts for his Selective Service Regulation 652.14. Furthermore, it is obvious that such Regulation represented not a valid interpretation of either of the Extension Acts, but an unwarranted assumption of power to extend the assignment of conscientious objectors to work of national importance, without the slightest authority for such extension in the terms of either of those Acts.

It is submitted, therefore, that since at the time petitioner left Civilian Public Service Camp No. 148, as charged in the indictment, he had performed work of national importance for more than the 12-month period specified by the Selective Training and Service Act of 1940, petitioner in so doing committed no offense against the United States, and his conviction, therefore, should be reversed.

Accordingly, petitioner respectively submits that a writ of certiorari should issue, as prayed, to the Circuit Court of the United States for the Ninth Circuit.

Respectfully submitted

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August 1, 1946

APPENDIX A

Selective Service and Training Act of 1940, as amended (54 Statutes 885; 50 U. S. C. App. 303 (a), (b), 305 (g)

"3 (a) Except as otherwise provided in this Act, every male citizen of the United States, and every male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. . . .

3 (b) Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense.

5 (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. . . ."

Service Extension Act of 1941

(Public Law 213, 1941, approved Aug. 18, 1941; 55 Statutes 626; 50 U. S. C. App. Sec. 351, 352)

"The Congress, acting in accordance with and solely for the purpose of carrying into effect the provisions of section 3 (b) of the Selective Training and Service Act of 1940 hereby declares that the national interest is imperiled.

Sec. 2. The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under said Act, members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* that the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress."

TERRITORIAL USE OF ARMY AND EXTENSION OF SERVICE PERIOD

(Public Law 338, 1941, approved December 13, 1941; 55 Statutes 799; 50 U. S. C. App. Sec. 731, 732)

"The provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-Sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war.

Sec. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* that nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case."

EXECUTIVE ORDER NO. 8862, AUGUST 21, 1941

(6 Fed. Register 4319)

"By virtue of the authority conferred upon me by section 2 of the Service Extension Act of 1941 (Public Law 213, 77th Congress, approved August 18, 1941), and as Commander-in-Chief of the Army and Navy of the United States, it is ordered as follows:

1. The periods of training and service of all persons inducted for training and service under the provisions of the Selective Training and Service Act of 1940, as amended, who are now, or who may hereafter be, in such training and service, are hereby extended for a period of 18 months, unless such persons are sooner discharged. . . . ."